IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

J U D G M E N T

Ayad Singh Vs. State of Rajasthan

D.B. CRIMINAL APPEAL NO.1011/2003
against the judgment dt.16.7.2003
passed by the Sessions Judge, Jaisalmer,
in Sessions Case No.7/2001.

Date of Judgment: August 08,2006

P R E S E N T

HON'BLE MR.JUSTICE N.N.MATHUR
HON'BLE MR.JUSTICE R.P.VYAS

Mr.M.D.Purohit Senior Advocate, with
Mr.Anand Purohit, for the appellants.

Mr.O.P.Rathi, Public Prosecutor.

REPORTABLE BY THE COURT: **(PER HON'BLE MR.MATHUR J.)**

1. This appeal is directed against the judgment dated 16.7.2003 passed by the learned Sessions Judge, Jaisalmer, convicting the appellant Ayad Singh of offence under Section 302 IPC and sentencing to imprisonment for life and to pay a fine of Rs.1000/- and in default, to further undergo six months' rigorous imprisonment.

2. Briefly stated the prosecution case is that on 5.1.2001 at about 10.25 PM, PW 5 Pol Singh lodged an F.I.R. at the Police Station, Phalsund stating inter alia that on the fateful day, stone slabs were being laid on the roof of his as well as Narpat Singh's house. At about 5.30 PM while he was sitting at his residence alongwith others, appellant Ayad Singh armed with gun accompanied by Bulidan Singh, Jabbar Singh and Surendra Singh arrived, hurling abuses with the intention to shoot them. He was stopped by his sister deceased Chandra Kanwar but she was hit by the gunshot fire resulting into his death instantaneously. On this information, the police registered a case for the offence under section 302 IPC and proceeded with investigation. The police inspected the site, prepared necessary memos and sent the dead body for autopsy.

3. P.W.4 Dr.Mohd. Yakub conducted the post mortem vide Ex.P.6. He noticed the following injuries on the person of deceased Chandra Kanwar:

> "An excavated oval shaped lacerated wound 8cm x 6cm slightly ragged with contused margins found at the left clavicular area of chest. Margins & tissues around the wound are cherry red in colour. Middle portion of left clavicle was missing and found in form of multiple small fragments at base of wound & lung tissues. Blood vessels with nerves at base of wound are severely damaged. Upper & middle portions of left lung blackened, contused & lacerated badly on lateral side.

> A plastic wad found embedded at middle portion of left lung. Multiple grains of size of "Bajra" particles felt manually embedded on portion lat. thoracic wall & left lung. Left side of thoracic cavity was full of blood.

As per the doctor, the injury was reported to be ante mortem in nature. In his opinion, the cause of death was shock as a result of internal haemorrhage due to gunshot injury.

4. The police arrested the appellant Ayad Singh and recovered a 12 bore gun in pursuance of the information given by him. After usual investigation, the police laid chargesheet against the appellant for the offence under Section 302 IPC.

5. During trial, the prosecution adduced oral and documentary evidence in support of its case. The appellant in his statement under Section 313 CrPC denied the correctness of the prosecution evidence appearing against him. He denied to have fired the gun at deceased Chandra Kanwar. However, he gave his own version of the incident. He stated that on the date of incident, he wanted to proceed to Jaisalmer by bus to get the licence of his gun renewed. However, he was stopped by PW 5 Pol Singh and on his request, he went to his house for laying slabs on the roof of his house. After the job was over, while they were taking

food, a quarrel took place with Chatar Singh. The reason of the quarrel was the earlier incident which took place sometime back as to cutting of shrubs in the field. In the incident, he slapped Chatar Singh and then returned to his house leaving his gun at the house of Pol Singh. However, after some time, Pol Singh and Chatar Singh arrived and took him to their house on the pretext to join them at dinner. He went to their house alongwith Pol Singh and Chatar Singh. He expressed that perhaps they had taken him to their house as a part of their plan to thrash him. At their house, about 10-15 persons were consuming liquor. At that time, Chatar Singh mounted attack on him. Jalam Singh caught hold of his hands. Narain Singh wanted to shoot him by gun, which was already lying there. Narpat Singh wanted to load the gun to kill him but somehow he caught hold of the same. The other persons including the male and female intervened and advised to desist from such act. While they were grappling, deceased Chandra Kanwar arrived. She tried to snatch the gun. In the scuffle, the gun went off, somehow hitting Chandra Kanwar leaving the gun in his hand. He left the place of occurrence alongwith his gun. He pleaded ignorance as to how Chandra Kanwar died. On the next day, he surrendered himself before the Deputy Superintendent of Police, Pokaran. At the time of incident, Teja Ram was also at the house of Pol Singh. His son Surendra Singh raised voice to save him. There were about

10-15 persons. He produced DW 1 Ganga Singh, DW 2 Bulidan Singh, DW 3 Monga Ram and DW 4 Herkha Ram.

6. We have scanned, scrutinized & evaluated the entire evidence exhaustively. The prosecution in order to bring home the guilt of the appellant, has produced witnesses of occurrence viz; PW 5 Pol Singh, PW 6 Pep Singh, PW 7 Aam Singh, PW 9 Narpat Singh and PW 11 Jalam Singh.

7. PW 5 Pol Singh is the star witness of the prosecution, as the incident took place at his house in which his sister deceased Chandra Kanwar died. He stated that on the date of incident, 20-25 persons from the village had assembled for laying slabs on the roof of his as well as Narpat Singh's house. The appellant Ayad Singh was also one of them. After the job was over, 6-7 persons including appellant Ayad Singh were sitting at the house of his brother PW 9 Narpat Singh. Appellant Ayad Singh from the house of Narpat Singh came to his house and picked up quarrel with his another brother Chatar Singh. On being pacified by him and others, Ayad Singh and Chatar Singh left for their respective houses. Other persons also left the place after taking dinner. After sometime, appellant Ayad Singh with a 12 bore gun in his hand alongwith Bulidan Singh, Jawahar Singh, Jabbar Singh and Surendra Singh arrived hurling abuses. At that time, he was sitting alongwith PW 9 Narpat Singh,

Jalam Singh, Ratan Singh, Chatar Singh and his sister deceased Chandra Kanwar over a sand-dune at an open space in between his house and that of Chatar Singh. Appellant Ayad Singh called Chatar Singh to come out. His sister with folded hands requested the appellant to return to his house. Appellant Ayad Singh wanted to kill Chatar Singh. He was in high temper. He abused his sister also and considering that she was from the family of Chatar Singh, shot the fire at her. His sister succumbed to the injury on the spot. There is a lengthy cross examination but nothing substantial has been brought in to discredit the testimony of this witness.

8. PW 6 Pep Singh was also among the persons, who had laid slabs on the houses of Pol Singh and Narpat Singh. He stated that after the job was over, while about 15-20 persons including him were taking dinner at the house of Pol Singh, appellant Ayad Singh arrived from the house of Narpat Singh. An oral altercation took place between Chatar Singh and appellant Ayad Singh. They intervened and somehow pacified the appellant Ayad Singh and sent him to his house. He also took the food and returned to his house. After sometime, he heard of the appellant Ayad Singh returning with a gun in his hand. His house is at a distance of about 30 pawandas from the house of Pol Singh. He came out of his house. Ayad Singh challenged Chatar Singh and

asked him to come out. Ayad Singh was followed by Bulidan Singh, Jabbar Singh, Surendra Singh etc. On the top of sand-dune near the house of Pol Singh, Pol Singh, Jalam Singh and Ratan Singh were standing. Chatar Singh was standing near the slabs lying there. On voices being raised, deceased Chandra Kanwar also arrived and tried to pacify appellant Ayad Singh. However, the appellant Ayad Singh out of anger fired the gun. The persons standing on the sand-dune had hardly proceeded to 2-4 steps and the appellant loaded the gun second time and aimed at them. Thus, they could not proceed further. Thereafter, Ayad Singh left the place. Bulidan Singh, Jabbar Singh and Surendra Singh also followed Ayad Singh. He has given further details with regard to investigation. There is lengthy cross examination but nothing substantial has been elicited to discredit the testimony of this witness.

9. PW 7 Aam Singh deposed that on the date of incident, the slabs were being laid on the houses of PW 5 Pol Singh and PW 9 Narpat Singh. After the job was done, the food was arranged at the houses of Narpat Singh and Pol Singh. He took food at both the places. At the house of Narpat Singh, an altercation took place between Chatar Singh and appellant Ayad Singh. However on intervention by some people, appellant Ayad Singh was sent to his house. Other people after taking food returned to their houses. In the

evening at about 5.30, he heard high raised voices at his residence. He proceeded towards the place of incident. There was a small sand-dune in between the house of Pol Singh and Chatar Singh. He witnessed the incident from another sand-dune. Appellant Ayad Singh was shouting that he would kill the entire family of Chatar Singh. He further stated that Ayad Singh fired the gun hitting deceased Chandra Kanwar. Chandra Kanwar died on the spot. It was also stated that the police visited the place of incident in the night. The investigation commenced next day in the morning. There is a lengthy cross examination but nothing substantial has been pointed out to discredit the testimony of the witness.

10. PW 9 Narpat Singh is the brother of deceased Chandra Kanwar. He stated that on the date of incident, the slabs were laid on the roof of his house. At that time, there were 15-20 persons. Appellant Ayad Singh was also one of the persons who laid slabs on the roof of his house. About 6-7 persons took the food at his residence and the rest, at the house of Pol Singh. Appellant Ayad Singh had taken food at his residence. Thereafter, appellant Ayad Singh went to the house of Pol Singh. He also followed him. Chatar Singh was sitting at the house of Pol Singh. Ayad Singh took up the quarrel with Chatar Singh. The villagers intervened and sent Ayad Singh to his house. At about 5.30, appellant Ayad

Singh returned armed with a gun. He was followed by Bulidan Singh, Surendra Singh and Jabbar Singh. Appellant Ayad Singh challenged Chatar Singh and asked him to come out. Deceased Chandra Kanwar intervened requesting appellant with folded hands not to kill anyone. However, appellant considering Chandra Kanwar belonging to the family of Chatar Singh, out of anger fired the gun causing injuries to Chandra Kanwar. After sometime, appellant Ayad Singh left the place for his house. Nothing substantial has been brought in the cross examination to discredit the testimony of this witness.

11. PW 11 Jalam Singh deposed that on the date of incident, he was at the residence of Pol Singh and Narpat Singh for putting slabs on their houses. Upto 12 – 1.00 PM, the slabs were laid on the house of Pol Singh and thereafter on the house of Narpat Singh. There were about 10-15 persons, which included Hanuman Singh, Pol Singh, Narpat Singh, Ratan Singh, Ayad Singh (appellant) and Chatar Singh. After the job was over, the food was arranged at the house of Pol Singh. Appellant Ayad Singh was initially at the house of Narpat Singh and thereafter he came to the house of Pol Singh. A quarrel took place between Chatar Singh and Ayad Singh at the house of Pol Singh. On their intervention, both of them were pacified and sent to their respective houses. Thereafter, while he alongwith Pol Singh, Chandra

Kanwar, Narpat Singh and Ratan Singh, was standing on the sand-dune, appellant Ayad Singh arrived armed with a gun hurling abuses. He was being followed by Bulidan Singh, Jabbar Singh and Surendra Singh. Ayad Singh exhorted that he would kill Chatar Singh, therefore, he should be sent out. His aunty deceased Chandra Kanwar intervened and tried to cool him down. However, out of anger, Ayad Singh fired the gun hitting Chandra Kanwar on account of which she fell down and died. There is a lengthy cross examination but nothing substantial has been elicited to discredit the testimony of this witness.

12. At this stage, it would be convenient to deal with the defence evidence as well. DW 1 Ganga Singh stated that he had visited the house of Bhanwar Singh for attending a ceremony before marriage. He was consuming liquor at his residence. He witnessed that appellant Ayad Singh attacked on Chatar Singh. He alongwith others intervened. Thereafter, Ayad Singh went to his house. He left the gun at the house of Pol Singh. After sometime, Pol Singh and Chatar Singh brought Ayad Singh to their residence for taking food. Thereafter, Narpat Singh brought the gun of Ayad Singh which he left at the house of Pol Singh. The gun was loaded. Narpat Singh, Pol Singh, Chatar Singh etc. mounted attack on Ayad Singh. Ayad Singh in order to save him, caught hold of the gun. While they were grappling, the

ladies of the family also arrived. Suddenly, the gun went off hitting Chandra Kanwar. He also stated that incident took place out of sudden heat. In the cross examination, he admitted that Ayad Singh was his uncle in relation.

13. DW 2 Bulidan Singh stated that on 5.1.2001, he was at his residence. Appellant Ayad Singh was getting ready for boarding the bus to Jailsalmer to get renewal of licence of his gun. While he was at the bus stand, PW 5 Pol Singh brought him back with a view to help in laying slabs on his house. Ayad Singh helped Pol Singh and Narpat Singh in putting slabs on their houses. After the job was over, Pol Singh and Narpat Singh arranged liquor and food for all the persons. While they were consuming liquor, a verbal altercation took place between Chatar Singh and Ayad Singh. Chatar Singh mounted attack on Ayad Singh. Bhanwar Singh was also at the place of the incident and consuming liquor. Chatar Singh tried to make assault on Ayad Singh but people assembled there intervened and sent Ayad Singh to his house. After sometime Chatar Singh and Pol Singh visited the house of Ayad Singh and took him to their house under the pretext to join them on food. Initially Ayad Singh resisted their prayer and ultimately, he agreed to accompany them. All the three went inside the house of Pol Singh. At that time, Narpat Singh arrived armed with a 12 bore gun belonging to Ayad Singh. Ayad Singh caught

hold of the gun. Some ladies also assembled and tried to snatch the gun. In the scuffle, the gun went off hitting Chandra Kanwar.

14. DW 3 Monga Ram alias Mangilal stated that he was looking after the construction work at the house of PW 5 Pol Singh at the relevant time. He also worked at Narpat Singh's house. Number of people were called for laying slabs on the houses of Pol Singh and Narpat Singh. Ayad Singh had boarded the bus for going to Jaisalmer but he got down in order to help Pol Singh for laying slabs on his house. He was carrying a gun and a bag in his hand. He put the gun and the bag at the place of construction and engaged himself in doing the work. He also went to the house of Narpat Singh for putting slabs on the roof of his house. All the people assembled at the house of Pol Singh for taking food. Pol Singh had offered liquor to all the persons. Incidentally, a quarrel took place between Chatar Singh and appellant Ayad Singh. Chatar Singh slapped Ayad Singh. In turn, Ayad Singh also slapped Chatar Singh. At that time, Bhanwar Singh also arrived. Chatar Singh tried to inflict a blow by "Jambia" on Ayad Singh. The people on the spot intervened and dispersed them. Appellant Ayad Singh infuriated of the incident, left the place for his house. He forgot to take his gun and bag with him. Pol Singh went to the house of Ayad Singh and brought him back. While Pol

Singh had brought Ayad Singh to his house, Narpat Singh picked up the gun of Ayad Singh and loaded the same. Before Narpat Singh could do anything, Ayad Singh in his defence caught hold of barrel of the gun. The butt and the trigger of the gun were in the grip of Narpat Singh. They were grappling. The ladies of the family in order to save, surrounded them. Accidentally, the gun went off hitting Chandra Kanwar on account of which she fell down. He also stated that at the time of incident, Ganga Singh and Mooldan Singh were present there.

15. The defence has lastly examined DW 4 Herkha Ram with a view to show that PW 7 Aam Singh could not be a witness of occurrence, as at the relevant time, he was on duty with the Food Corporation of India. He stated that on 5.1.2001, he was on duty as a Guard at the Depot of the Food Corporation of India. While he was on duty, the truck bearing No.RJM 1838 being driven by Kan Singh arrived. A reading of the entire statement shows that there is no reference of Aam Singh. The learned trial Judge has rejected the testimony of this witness on the same ground that in his deposition, he has not referred to any of the witnesses of occurrence. No contention has been raised in that regard by the learned counsel for the appellant.

16. Assailing the conviction, it is contended by Mr.M.D.Purohit, learned Senior Advocate, that the prosecution has failed to give true genesis of the occurrence and, as such, the entire case deserves to be rejected. It is also submitted that the important witnesses like Chatar Singh, Ratan Singh and Dalpat Singh have not been examined by the prosecution, as such, an adverse inference be drawn. It is further submitted that the important witness of the occurrence viz; Mangilal has been examined by the defence so as DW 3 Monga Ram alias Mangilal. The main cause of trouble was Chatar Singh but the prosecution has not examined him. Learned Counsel for the appellant has made good deal of argument that appellant did not intend to kill Chandra Kanwar. It is a case of accidental firing in which Chandra Kanwar was killed. It is submitted that the provisions of Section 301 IPC are not attracted in the facts of the case. Heavy reliance is placed on a decision of the Apex Court in Kashi Ram v. State of M.P. reported in AIR 2001 SC 2902. Learned counsel has also placed reliance on a Division Bench decision of this Court in Ram Kumar v. State reported in AIR 1970 Raj.60.

17. On the other hand, learned Public Prosecutor has supported the judgment of the learned trial Court.

18. We have considered the rival contentions. We have already referred-to the evidence of the prosecution witnesses. The consistent evidence of the witnesses of occurrence viz; PW 5 Pol Singh, PW 6 Pep Singh, PW 7 Aam Singh, PW 9 Narpat Singh and PW 11 Jalam Singh is that the appellant opened fire of the gun hitting deceased Chandra Kanwar on account of which she died. This aspect is not disputed even by the defence. The defence plea is that the gun was in the hands of Narpat Singh. Appellant Ayad Singh wanted to snatch the gun and while they were grappling for it, deceased Chandra Kanwar intervened and accidentally the trigger was pressed hitting Chandra Kanwar. Appellant Ayad Singh himself has stated that the gun came into his hands. Having carefully examined the evidence of the defence witnesses, we are unable to accept the plea taken by the appellant. There is overwhelming evidence that appellant Ayad Singh fired the gun hitting Chandra Kanwar. The testimony of the eye witnesses finds corroboration from the medical evidence as well as the recovery of the gun. The appellant was arrested vide Ex.P.4. In pursuance of the information given by the appellant vide Ex.P.20, a 12 bore licenced gun belonging to the appellant Ayad Singh was recovered vide Ex.P.14. It may be stated that an empty cartridge was recovered from the spot which was sent to the Forensic Science Laboratory. The FSL Report Ex.P.22 shows that the recovered 12 bore gun was a serviceable firearm.

Comparing with the cartridge, it has been opined that the 12 bore cartridge case was fired from 12 bore single barrel gun. It is not necessary to deal with the link evidence as the same has not been challenged by the learned counsel for the appellant.

19. The crucial issue involved in the instant case is as to whether the appellant had any intention to commit murder of Chandra Kanwar. It emerges from the prosecution evidence that in a small village, the prosecution witnesses and others had asembled for laying slabs on the roof of house of PW Pol Singh and that of PW 9 Narpat Singh. Pol Singh and Narpat Singh had arranged food after the job was over. They consumed liquor before taking food. As per the prosecution case, a quarrel took place between the appellant and Chatar Singh. Both were cooled down and sent to their respective houses. After sometime, appellant returned armed with a gun with an intention to kill Chatar Singh. However, on intervention, deceased Chandra Kanwar was hit. Appellant Ayad Singh has produced the defence witnesses to show that while leaving the house of Pol Singh, the gun was left there and as a part of the conspiracy, appellant was brought back from the house of Narpat Singh, who picked up the gun and wanted to fire but before he could do anything, appellant caught hold of the barrel of the gun and at that time, deceased Chandra Kanwar intervened

and tried to snatch the gun from both of them but accidentally, the gun went off hitting Chandra Kanwar. On appreciation of evidence, we find that the defence version is not probable. There was no reason for Pol Singh to bring appellant Ayad Singh back with ill motive. There was no reason for Narpat Singh to pick up the gun with a view to shoot the appellant. Thus, it clearly emerges that the appellant returned from his house armed with a gun with an intention to settle the score with Chatar Singh. It further appears that appellant had no intention to kill Chandra Kanwar. But simply because he had no intention to commit murder of Chandra Kanwar, he cannot get escape from the charge of murder punishable under Section 302 IPC in view of explanation as provided under Section 301 IPC, which reads as follows:

> **"301. Culpable homicide by causing death of person other than person whose death was intended.-** If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."

20. This provision embodies what the English authors describe as the doctrine of **transfer of malice** or the transmigration of motive. The learned author has given an

illustration stating that if `A' intends to kill `B' but kills `C' whose death he neither intends nor knows himself to be likely to cause, the intention to kill `C' is by law attributed to him. The illustration is drawn from the Law of Crimes Ratanlal and Dhirajlal revised by His Lordship Justice C.K.Thakker, presently the Hon'ble Judge, Supreme Court of India. Another illustration given is that if `A' aims a shot at `B', but it misses `B' either because `B' moves out of the range of the shot or because the shot misses the mark and hits some other person, `C' whether within sight or out of sight, under this Section `A' is deemed to have hit `C' with the intention to kill him.

21. It is submitted by the learned counsel that in the facts of the case, the offence against the appellant does not travel beyond Section 304 part II IPC. In support of the contention, he has referred-to a decision of the Apex Court in Kashi Ram v. State of M.P. reported in AIR 2001 SC 2902. In the said case, eight accused persons were put to trial for the murder of three persons. It was alleged that accused Inderlal fired the gun hitting Lakhan resulting into his death. Another accused Ramesh fired the gun at Brindawan resulting into his death. He again fired aiming at Sundera (PW 7) which accidentally hit Jamuni Bai. The trial Court acquitted all the accused persons. During pendency of the appeal before the High Court, Inderlal died. Out of other left

out seven accused persons, appellant Ramesh alone was held guilty of the offence u/s.302/149 IPC. Before the Apex Court, the contention was raised that accused Ramesh was entitled to plea of self defence. The Apex Court found it to be a case of exceeding the right of private defence, as such, convicted him of offence u/s.304 part II IPC for killing Brindawan. Appellant Ramesh was also responsible for killing Jamuni Bai. It was found that in the case of killing of Brindawan, he had exceeded the right of private defence, as such, convicted for the offence u/s.304 part II. While applying Section 301 IPC, he was held responsible for the offence u/s.304 part II IPC for killing Jamuni Bai as well. On the strength of the said case, the offence as against the appellant Ayad Singh cannot be brought down to Section 304 part II IPC. In the said case, the Court found it to be a case of exceeding the right of private defence punishable u/s.304 part II IPC for killing of Brindawan. He again fired aiming PW 7 Sundera which incidentally hit Jamuni Bai. Thus, applying the doctrine of transfer of intention considering case of exceeding right of private defence, he was held guilty of the offence u/s.304 part II IPC. But in the instant case, the intention to commit murder stood transferred, as it emerges from the prosecution evidence that at the first instance, a quarrel took place between appellant and Chatar Singh and the prosecution witnesses pacified and sent them to their respective houses. At the

second instance, appellant did not cool down and after sometime, returned armed with gun, challenged Chatar Singh and fired the gun hitting Chandra Kanwar. Thus, though appellant did not intend to commit murder of Chandra Kanwar but in view of Section 301 IPC applying the doctrine of **transfer of malice**, he would be deemed to have intended to commit murder of Chandra Kanwar. Thus, we are of the view that the trial Court has rightly convicted the appellant Ayad Singh of offence u/s.302 IPC.

22. In view of the aforesaid discussion, we find no merit in the instant appeal and the same stands dismissed. Appellant Ayad Singh is in jail. He will serve out the remaining part of the sentence.

(R.P.VYAS), J. **(N.N.MATHUR), J.**

RANKAWAT JK, PS